



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Abubakar v Modern Coast Builders and Contractors Ltd (Miscellaneous Application
15 of 2022) [2022] KEELRC 13243 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13243 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

MISCELLANEOUS APPLICATION 15 OF 2022

AK NZEI, J

NOVEMBER 17, 2022

BETWEEN

FIRDAUS ATHMAN ABUBAKAR APPLICANT

AND

MODERN COAST BUILDERS AND CONTRACTORS LTD RESPONDENT

RULING

1. Before me is the Respondent's Notice of Motion dated 27th May 2022 and filed in Court on 30th May 2022. The Respondent/Applicant is seeking the following orders:-
 - a. that pending hearing and determination of the application, the Court be pleased to stay the enforcement of the award and proceedings leading to the enforcement of the award by the Director of Occupational Safety and Health Services dated 11th November 2019 and all other consequential orders thereto.
 - b. that the Court be pleased to revoke the award by the Director of Occupational Safety and Health Services and subsequent orders entered against the Applicant on 11th November 2019, and all other consequential orders thereto.
 - c. In the alternative refer the matter back to the Director of Occupational Safety and Health Services for fresh consideration.
 - d. costs of the application be provided for.
2. The application is supported by the affidavit of Christine Mfutu sworn on 27th May 2022. It is deponed in the said affidavit:-
 - a. that the deceased was employed in the Administration department majoring in fuel management Logistics and IT, and was stationed in the Respondent's office in Mombasa.



- b. that the road traffic accident occasioning the death of the deceased was not in the cause of employment, or with the employer's vehicle, or within the premises of the employer and that the deceased was not on official assignment.
 - c. that the process leading to the award by the Director of Occupational Safety and Health Services was marred with fraud, and that the whole claim and award was shrouded with fraud, thereby denying the Respondent an opportunity to appeal/object against the Director's award or to this Court within the prescribed period.
 - d. that if the award is allowed, the Court will be enforcing an illegality to the Respondent's detriment.
3. The application is opposed by the Applicant/Respondent vide a Replying Affidavit sworn on 8th June 2022.
 4. Section 16 of the [Work Injury Benefits Act](#) provides as follows:-

“no action shall lie by any employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”
 5. Section 23 of the said Act provides as follows:-
 - “(1) after having received notice of an accident or having learned that an employee has been injured in an accident, the director shall make such enquiries as are necessary to decide upon any claim or liability in accordance with this Act.
 - (2) an inquiry made under subsection (1) may be conducted concurrently with any other investigation.
 - (3) an employer or employee shall, at the request of the director, furnish such further particulars regarding the accident as the director may require.
 - (4) a person who fails to comply with the provisions of Subsection (3) commits an offence.”
 6. It is clear from the foregoing Sections of the WIBA that determination of liability and assessment of compensation payable thereon in work injury claims is the preserve of the Director of Occupational Safety and Health Services. The [Work Injury Benefits Act](#) does not confer primary and/or original jurisdiction on this Court to open or to fault the Director's decision on any matter. Indeed, Section 51 of the [Work Injury Benefits Act](#) provides as follows:-
 - “(1) any person aggrieved by a decision of the Director on any matter under this Act, may within sixty days of such decision, lodge an objection with the Director against such decision.
 - (2) the objection shall be in writing in the prescribed form accompanied by particulars containing a concise statement of the circumstances in which the objection is made and the relief or order which the objector claims, or the question which he desires to have determined.”



7. Section 52 of the Act provides as follows:-

“(1) the Director shall within fourteen days after the receipt of an objection in the prescribed form, give a written answer to the objection, varying or upholding his decision and giving reasons for the decision objected to, and shall within the same period send a copy of the statement to any other person affected by the decision.

(2) An objector may, within thirty days of the Director’s reply, appeal to the Industrial Court against such decision.”

8. The upshot of the aforesaid provisions of the statute is that the Director’s decision on any matter that has been objected to can only be opened, interrogated or faulted by this Court on appeal. The Respondent/Applicant did not object to the Director’s decision dated 11th November 2019 within the prescribed period, which decision the Applicant/Respondent has, vide the proceedings herein, moved this Court to enforce.

9. The enforcement process is unstoppable for reasons that I have given in my ruling on the Applicant/Respondent’s application for enforcement of the Director’s decision dated 17th March 2022.

10. For record purposes, the Industrial Court as mentioned in Section 52(2) of WIBA was the forerunner of this Court, and in the context of the Act refers to this Court.

11. I find no merit in the Notice of Motion dated 27th May 2022, and the same is hereby dismissed with costs.

12. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MOMBASA THIS

17TH DAY OF NOVEMBER 2022

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Nyongesa for Applicant/Respondent

N/A for Respondent/Applicant

